IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1128

PHOENIX NEWSPAPERS, INC., a corporation;
and MICHAEL PADEV,

Appellants,

v.

WADE CHURCH,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS,
STATE OF ARIZONA, DIVISION ONE,
DEPARTMENT B.

MOTION TO DISMISS OR AFFIRM

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Appellee moves to dismiss the appeal for lack of jurisdiction under U.S.C. § 1257(2), or alternatively, to affirm on the ground that the federal questions presented are so insubstantial as not to justify further argument.

Should this Court treat the Jurisdictional Statement as a Petition for Writ of Certiorari, pursuant to 28 U.S.C. § 2103, it is respectfully submitted that such Petition should be denied.

OPINION BELOW

The Opinion of the Court of Appeals reported in 24 Ariz. App. 287, 537 P.2d 1345, and reproduced as a part of the Appendix to the Jurisdictional Statement has been printed with an inadvertent omission. We have reprinted the portion of the decision in which the omission occurs, identifying the omitted portion, as a part of the Appendix to this Motion.

In addition, the Opinion appealed from states:

> "Inasmuch as the evidence introduced during the second trial was in most respects substantially identical to that introduced in the first trial, we will not attempt to set forth the background facts pertinent to the libel claim. *These facts have been stated in detail by the Arizona Supreme Court in its prior opinion, and the reader is referred to that opinion for the background facts essential to an understanding of this opinion.*" (Emphasis supplied) (App. to Appellants' Jurisdictional Statement at 2).

We have printed as a part of our Appendix, the earlier Opinion of the Arizona Supreme Court reported at 103 Ariz. 582, 447 P.2d 840 (1968), thus incorporated by reference in the decision from which this appeal has been taken.

JURISDICTION

We do not believe that there was "drawn into question" in the courts below the constitutionality of Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure dealing with motions for a directed verdict, motions for judgment notwithstanding the verdict and motions for a new trial at the trial level. We also do not believe that there was "drawn into question" the constitutionality of A.R.S. § 12-2102 dealing with the review of the denial of such motions on appeal. *Cf. Baltimore & P.R. Co. v. Hopkins*, 130 U.S. 210,

9 S. Ct. 503, 32 L. Ed. 908 (1889).

The Arizona Rules are identical in pertinent part to the same numbered Federal Rules of Civil Procedure while the provisions of A.R.S. § 12-2102 set forth conventional rules regulating review of such determinations in appellate courts.

Appellants real point is not addressed to these Rules and Statute. It seems instead, to be that this Court's holding in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) requires trial and appellate courts to review the evidence as to actual malice *de novo* and in that connection, "weigh the evidence, draw such inferences as he deems justified, and make his own determinations comparing the credibility of witnesses." (App. to Appellants' Jurisdictional Statement at 20-21).

Nothing in the text of the Rules or the statute would inhibit such evaluation if the court believed that the *Times* case required it. What the Court below held was that:

> "This would be clearly contrary to the normal duty of the trial judge under well-established principles in Arizona law holding that on a motion for directed verdict the trial judge must view the evidence in a light most favorable to the opposing party, accepting the truth of whatever evidence he has introduced, together with all reasonable inferences to be drawn therefrom. DAVIS v. WEBER, 93 Ariz. 312, 380 P.2d 608 (1963); CITY OF PHOENIX v. BROWN, 88 Ariz. 60, 352 P.2d 754 (1960); JOSEPH v. TIBSHERANY, 88 Ariz. 205, 354 P.2d 254 (1960)." (App. to Appellants' Jurisdictional Statement at 21).

Thus, the court did not regard itself as ruling upon the procedural Rules or the statute, but instead, upon the settled practice of the Arizona Courts.

With respect to the substantive issue relating to the scope of review required by *Times v. Sullivan*, the Court stated:

"There is some support for defendants' contentions. See concurring opinion of Judge J. Skelly Wright in WASSERMAN v. TIME, INC., 138 U.S.App.D.C. 7, 424 F.2d 920 (D.C. Cir. 1970). However, in our opinion, the correct analysis of the TIMES v. SULLIVAN requirements in this regard is set forth in GUAM FEDERATION OF TEACHERS, LOCAL 1581, A.T.F. v. YSRAEL, 492 F.2d 438 (9th Cir. 1974). There the court considered the same argument being presented here, and held:

> " 'We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for directed verdict, or a motion for judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> " 'The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case.' 492 F.2d at 441. (Emphasis in original).

"We therefore reject the contentions advanced by defendants on this issue." (App. to Appellants' Jurisdictional Statement at 21-22).

Accordingly, the determination below did not rest on a

construction of the Rules or the Arizona Statute. It rested, instead, on the proposition that the federal law did not require a change of the practice of Arizona State Courts in reviewing the evidence on motions for a directed verdict or for a judgment notwithstanding the verdict.

COUNTERSTATEMENT OF THE CASE

On May 7, 1959, Wade Church, then Attorney General for the State of Arizona, delivered a speech in Flagstaff, Arizona, to the delegates of an AFL-CIO convention, condemning domination of the State Legislature by management's special interest groups.

The Arizona Supreme Court considered the most pertinent portions of this speech to be as follows:

> " '* * * I want to talk to you a little bit tonight about why labor is in politics in Arizona. I think there is a number of reasons. I think the first reason is because management is dominating the political scene in this state, and they have dominated it since 1912.
>
> * * * *
>
> " '* * * I think the first problem with reference to politics is the legislative control. Do you know that this legislature is controlled lock, stock and barrel by a third house that is not even elected by the people? They have a representative in the Hotel Adams that coordinates the work of all the special interest groups and you can't get a bill through unless you get their okay, and I am talking about the mining groups, and power groups, and the construction groups, and the finance groups, and the cattle groups. They are all coordinated, they have a regular *council*, and the astounding thing is that the legislation that is passed and okayed by this group.* * *
>
> " 'We, the people, what do we have to say about it? * * * Nothing, absolutely, nothing. * * * It just makes

you wonder whether or not the fundamental structure of our democratic order here in this state is going under, and I believe it is unless we take steps to change that.

* * * *

" 'Now, the working people and the people's groups are going to have to do *the same thing*. We are going to have to build a *council*. We are going to have to have *full-time representatives* up there at that legislature. We are going to have to watch it carefully. The P.T.A. ought to have them. The *Council of Churches* ought to have them, the labor groups ought to have two or three and those teachers, they are the ones that got a lot of brains, doggone them, they should be out there, too. * * *

" 'But the thing that worries me is this, that if we don't do it, Democracy as we conceive it and as our kids learn it in the schools, will no longer exist in this state. If we don't *match stride for stride* the careful painstaking job that these special interest groups do in presenting their viewpoints to the legislature, *ours and others*, if we don't match that with the *people's council*, we are dead as a dodo and Democracy dies with it. We will bury our Democratic Order. We can't afford any longer in this state to have these special interests running us. * * * If we don't do it, then our children are going to live in a very, very shabby world * * *. If the labor organizations don't spearhead this people's movement for a restoration of the basic democratic principles that our forefathers fought for, no one will do it, and I think once you take the labor movement out of our current system, we are dead. We are dead. And any hope for *anything other than a totalitarian state* is dead with it. * * *' " (Emphasis the Court's; App. hereto at A-8).

The Arizona Supreme Court also noted the manner in which the speech was reported by the Arizona Republic and Phoenix Gazette, the two newspapers published by the Appellant herein:

> "the day following, a news report of the speech appeared in the Arizona Republic and in part stated:

> " 'CHURCH FLAYS LEGISLATURE'S THIRD HOUSE
>
> " 'FLAGSTAFF (Special) - Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
>
> " 'He urged organized labor to join churches, PTA's, minority groups, and others and hire fulltime personnel to match *lobbyists* with the mines, power groups, construction industry, finance interests, and cattle groups. * * *'
>
> 'A similar news account was published in the Phoenix Gazette:
>
> " 'LABOR URGED TO COMBAT THIRD HOUSE'
>
> By Bruce Kipp, Gazette Staff Writer:
>
> 'FLAGSTAFF, May 7 - Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which, he says, management dominates the lawmaking in Arizona.
>
> " 'Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'If labor won't spearhead the movement, nobody will do it.'
>
> " 'We're going to do exactly what these boys are doing - hire our own representatives to this people's council to counteract the lobbyists of the mines, railroads, and utilities which in turn, control the state. * * *' " (Emphasis the Court's; App. hereto at A-10).

Thereafter, there followed the accused editorial, printed in toto in Appellant's Appendix containing the accusation that Mr. Church's proposal was that of a communist people's council and concluding:

> " 'THE 'PEOPLE'S COUNCIL' idea of Attorney General Church is therefore nothing but a disguised Marxist idea of minority rule over the majority.
>
> " 'We are certain that most Arizonians will resolutely

reject Mr. Church's alarming conceptions of government.' " (App. to Appellants' Jurisdictional Statement at 37-38).

The Arizona Supreme Court also described the litigation events leading to the first appellate review of this case in 1968 as follows:

> "Plaintiff Church immediately filed his complaint for libel against Phoenix Newspapers, Inc., the publisher, Eugene Pulliam, and the editorial writer, Michael Padev, in the Superior Court for Maricopa County. On May 21 defendants published plaintiff's reply to the editorial rejecting the newspaper's 'opinions and inferences expressed' regarding his talk. Defendants Pulliam and Phoenix Newspapers, Inc., after unsuccessful motions to dismiss the complaint, filed their answer thereto on May 29, 1961. Plaintiff thereafter was granted leave to amend his complaint, and it is upon the amended complaint, and the subsequent answers of all defendants, that issues were joined. The case came on for trial April 29, 1963, and after a lengthy trial the jury entered a verdict for plaintiff in the sum of $30,000.00 compensatory damages and $20,000.00 punitive damages. From this verdict and judgment, and from orders denying defendants' motions to set aside the verdict and judgment, and motions for a new trial, defendants appeal." (App. hereto at A. 14).

Pending appeal this Court came down with its landmark decision in *New York Times v. Sullivan, supra*. The Arizona Supreme Court's reversal of the trial court because of the new federal rule was epitomized as follows:

> "We therefore hold that: the court did not err in ruling the editorial was libelous per se and in so instructing the jury, but that the instruction defining actual malice did not meet the required federal rule, and therefore requires that the case be reversed for a new trial." (App. hereto at A. 39).

As noted by the Arizona Court of Appeals on the second appeal, the evidence introduced during the second trial was

in most respects substantially identical to that introduced in the first trial. (App. to Appellants' Jurisdictional Statement at 2). The major difference between the two trials was that every effort was made by counsel and the Court to conform to the determinations of the Arizona Supreme Court and the "required federal rule."

As noted in Appellants' Statement of the Case, the judgment of the Superior Court of the State of Arizona was entered on the basis of a jury verdict in the sum of $485,000.00, The judgment was affirmed by the Arizona Court of Appeals and a Petition for Review with the Arizona Supreme Court was denied by that Court in an Order dated and entered December 9, 1975.

ARGUMENT

The Issues Raised by Appellants' Question I as to the Scope of Review are Insubstantial.

We have already noted that no question of constitutionality of a statutory procedural Rule or other statute is involved in this case. Accordingly, Question I raises only the issue whether the trial and appellate courts should in a case involving a media libel of a public official appraise the fact issue of actual malice as if acting as the trier of the fact.

As is also noted above, the court below relied upon *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438 (9th Cir. 1974) for its determination that the trial court and appellate court was not required to give a review *de novo* deciding what inferences were to be drawn from the evidence in determining whether actual malice had been established.

Thus, the Opinion below on the one hand endorses the

proposition of *Guam* that the courts must review with care the evidence before them when confronted with an actual malice situation to avoid a chilling effect on First Amendment rights.

In the *Guam* case, the Ninth Circuit stated:

> "We agree with our brothers of the District of Columbia and Fifth Circuits that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment inferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' To be unprotected, actual malice must be shown with 'convincing clarity.' New York Times, supra, 376 U.S. at 285-286, 84 S.Ct. at 728-729." (492 F.2d at 441).

On the other hand, the Ninth Circuit and the Arizona Court of Appeals did not agree with the dictum of Judge J. Skelly Wright in which Judge Robinson concurred in *Wasserman v. Time, Inc.*, 138 U.S. App. D.C. 7, 9, 424 F.2d 920, 922-923 (1970), as to the requirements for Court review. In this respect, the Ninth Circuit stated:

> "However, with respect, we are not persuaded by the second phrase of Judge Wright's analysis in Wasserman which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom the motion for summary judgment, a

> motion for directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases, it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> "The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the New York Times standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case." (492 F.2d at 441).

The Court then asserted "We do not think that the authorities on which Judge Wright relies sustain his thesis." (492 F.2d at 441). It proceeded to discuss the decisions of this Court upon which Judge Wright rested his dictum.

That discussion, too lengthy for quotation, amply demonstrates that this Court did not by *New York Times* and its progeny intend to set the issue of actual malice apart as an exception to time honored rules for appraising evidence in connection with motions for a directed verdict, for judgment notwithstanding verdict, or for a new trial. Accordingly, the federal question asserted to be raised is too insubstantial for further argument.

The Issues Raised by Appellants' Question II Arguing the Sufficiency of the Evidence as to Actual Malice are Insubstantial.

Appellants' discursive and argumentative presentation embodied in their Question II, basically inquires whether "admissions by the author that he did not believe the official was a communist or communist sympathizer and by the publisher that he didn't know whether the official was a communist or not, constituted a showing of knowing falsehood judged by the standards of proof required by *Times v. Sullivan*, 376 U.S. 254."

These matters were discussed by the Court below as follows:

> "In defendants' view, the only evidence presented which could arguably justify a submission to the jury of this issue was the admission by defendant Padev, and the claimed admission by defendant Pulliam, that they did not believe that the plaintiff was a communist or a communist sympathizer. We do not agree that the evidence on this issue was quite so limited. The jury had before it the newspaper account of the plaintiff's speech which formed the basis for the writing of the editorial. There was extensive testimony concerning Padev's direct experience with, and study of, communist methods and ideology. In our opinion the jury was entitled to consider this evidence in arriving at a determination of whether the defendants necessarily knew that the plaintiff, in his Flagstaff speech, was not advocating a people's council of the kind and having the purpose defendant Padev described in the editorial. The Arizona Supreme Court in its prior opinion took the same view. Thus, Justice Lockwood stated:
>
> " 'To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, *as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.*' (Emphasis added) 103 Ariz. at 595, 447 P.2d at 853." (App. to Appellant's Jurisdictional Statement at 23-24)

It is thus apparent that appellants' argumentative presentation is incomplete. The Court below in fact made careful inquiry as to the sufficiency of the evidence and on that basis found that it supported the determination of actual malice under the rule of *Times v. Sullivan*.

It is not appropriate to ask this Court to review the evidence *de novo* in view of the studied evaluation of the evidence by the Court below, using the very standards which this Court has prescribed.

The Issues Raised by Appellants' Question III Again Arguing the Sufficiency of the Evidence as to Actual Malice are Insubstantial.

The gist of the lengthy argumentative and discursive presentation of fact embodied in Question III, appears to be contained in its final clause as follows:

> "[D]id admissions by the author of the editorial and publisher of the newspaper of lack of belief that the official was in fact a communist or communist sympathizer constitute sufficient evidence to support a finding with 'convincing clarity' that the Newspaper and its publisher and editor *knowingly* falsely stated that in the opinion of the newspaper the proposal made by the official was of an idea long associated with communists when in fact the Newspaper, its publisher and the editorial writer did not hold the opinion that the 'people's council' idea referred to, or *reasonably could be read as referring to*, a communist

device or technique?" (Appellants' Jurisdictional Statement at 9).

This question, under the principle of *Times v. Sullivan*, answers itself in the affirmative.

The comment of Justice Struckmeyer in the first decision of the Arizona Supreme Court does however, elucidate the basis for such an affirmative answer:

> "The jury, under the instructions of the trial court, found actual malice, malice in fact. I do not think it can reasonably be argued that there is insufficient evidence to sustain the verdict in this respect. The author of the editorial, Michael Padev, gained his information about Church's speech from a newspaper report. which is deserving of being requoted in part since, I believe, it is determinative of the question.
>
> " 'CHURCH FLAYS LEGISLATURE'S 'THIRD HOUSE'
>
> " 'FLAGSTAFF (Special) - Atty. Gen. Wade Chruch last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
>
> " 'He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power groups, construction industry, finance interests, and cattle groups.'
>
> "The newspaper account points out that what Wade Church meant by his use of the phrase 'people's council' was to 'hire full-time personnel to match lobbyists' with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. No stretch of the imagination can equate this democratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false. From knowledgeable

> falsity or a reckless disregard of whether it was false, there can be inferred malice. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686." (App. hereto at A. 41).

Nothing in the record suggests that the Court below did not apply correctly the standards applicable to a determination of actual malice in a media libel case as prescribed by this Court. Accordingly, the issues raised by Question III are insubstantial.

The Issues Raised by Question IV as to the Sufficiency of The Evidence are Insubstantial.

Question IV reads as follows:

> "Whether, *assuming that a public proposal is made by a public official under such circumstances that it can be understood as making a recommendation which could seriously adversely affect the public legislature process,* a newspaper editor and publisher to avoid being exposed to a large libel damage verdict must:
>
> (a) Assume that the public official really does not intend to recommend a dangerous idea even though members of the public may understand it as advocating a course injurious to the public, and avoid attacking the idea; or
>
> (b) Make inquiry of the public official as to the sense in which he made the proposal and, if the official claims an innocuous meaning was intended, refuse to risk warning the public of the dangers inherent in acceptance of the proposal?" (Appellants' Jurisdictional Statement at 9-10).

The Court of Appeals on the second appeal specifically dealt with this contention as follows:

> "We agree with the defendant's basic premise that an editorial writer is not required to consider whether a political figure actually believes in and supports proposals which he might publicly make. However, in

advancing their arguments, defendants ignore the fundamental issue in this case concerning the public proposal which was actually made by plaintiff, that is, did plaintiff, in his Flagstaff speech, advocate a people's council of the kind and having the purpose defendant Padev described in his editorial? If plaintiff's words were reasonably susceptible to the interpretation that plaintiff advocated a communist-type people's council, then plaintiff's personal undisclosed beliefs and defendants' knowledge or lack of knowledge of those beliefs, would be immaterial in any libel action which plaintiff might file. Such reasoning is not applicable, however, where, as in this case, the fundamental basis of the plaintiff's complaint is that the defendant's editorial completely and falsely misrepresented the nature of the proposal actually stated by plaintiff.

"In our opinion the evidence on the retrial was sufficient to justify the submission of the knowing falsity issue to the jury under the standards promulgated by TIMES v. SULLIVAN. Therefore we need not consider whether the law of the case doctrine in and of itself, would have required that this issue be submitted to the jury on the retrial." (App. to Appellants' Jurisdictional Statement at 26-27).

Again, the issues raised are too insubstantial to justify further review of this issue by this Court.

The Issue Raised by Appellants' Question V as to *Respondeat Superior* is Insubstantial.

Appellants' Question V raises the issue whether the actual malice of the author of the libelous editorial who was authorized to publish it for Phoenix Newspapers, Inc. by its President can be imputed to that corporation on the basis of *respondeat superior*.

We believe that this has been fully and properly answered by the court below and does not justify review by this Court. The Court below stated in pertinent part:

"Defendants contend that under the Times v. Sullivan 'actual malice' test, the jury could well have found that one or more of the defendants did not have the requisite knowledge of falsity, and therefore would not have been liable, notwithstanding possible liability on the part of other defendants.

• • • •

"In the facts in Times there was no employee having any responsibility in connection with the acceptance or publication of the allegedly libelous advertisement who knew the advertisement was false. Here both Padev and Pulliam were directly involved in the activities leading to the publication of the editorial, and as we have previously indicated in our opinion the evidence was sufficient to submit to the jury the issue of whether one or both of them had knowledge of its falsity. We find nothing in Times v. Sullivan or its progeny which would purport to change in any way well-settled principles of agency law making the employer liable for defamatory statements made by an employee acting within the scope of his employment. See Restatement of Agency Second, § 247.

"Under the facts of this case no sound argument can be made that defendant Padev's activities concerning the writing and publishing of the editorial were not within the scope of his employment with the defendant corporation. We therefore hold that actual malice on the part of either Pulliam or Padev would be imputed to the corporation as their employer." (App. hereto at A. 1).

The ruling of the Arizona Court of Appeals conforms to principles endorsed by this Court in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S. Ct. 465, 471 (1974). Accordingly, no substantial federal question was thereby raised.

The Issues Raised by Appellants' Question VI as to Circumstantial Evidence are Insubstantial.

Appellants' Question VI reads as follows:

"Whether the trial court's instructions to the jury in this case which gave the jury a correct instruction of the 'actual malice' proof requirements as requested by appellants nonetheless denied appellants due process of law by also giving, over the objections of appellants, additional confusing instructions appropriate to a libel case not involving First Amendment rights and limitations such as the instruction by which the jury was instructed that actual malice might be found based on 'a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity *from all the testimony and evidence introduced in this case*.' (Emphasis ours)." (Appellants' Jurisdictional Statement at 11).

The court below carefully reviewed all the instructions and concluded that neither error nor confusion resulted therefrom. (App. to Appellants' Jurisdictional Statement at 16).

With respect to the specific matter of Instruction No. 7 dealing with circumstantial evidence, the Court stated:

"Plaintiff's Requested Instruction No. 7, as given, reads as follows:

> " 'I instruct you that it is not necessary, and the plaintiff is not required, to prove actual malice on the part of the defendants by direct evidence. He may establish actual malice on the part of the defendants by a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity from all of the testimony and evidence introduced in the case.'

"It will be noted that Instruction No. 7 is essentially a circumstantial evidence instruction.

" * * * First, defendants contend that it contravenes SULLIVAN in that it allows the jury to 'find the fact

of actual malice by inference'. Defendants make no reference to specific language in SULLIVAN, nor has this Court found anything in SULLIVAN which would indicate an intention to modify traditionally accepted rules relating to the type of proof required to show actual malice. In Arizona, even in criminal actions where the burden of proof is beyond a reasonable doubt, any supposed legal distinction between the probative value of direct and circumstantial evidence has been abolished. See STATE v. HARVILL, 106 Ariz. 386, 476 P.2d 841 (1970). The SULLIVAN test for malice, involving as it does the state of mind of the defendant concerning his knowledge of falsity, would indeed prove difficult to meet if limited to direct proof through admissions or statements made by the defendant. While the SULLIVAN court does impose a high standard of proof - by clear and convincing evidence - we find nothing to indicate an intention to limit evidence on this issue to that traditionally referred to as 'direct evidence.'

"Defendants' second attack upon plaintiff's Instruction No. 7 appears to be based upon a burden of proof argument. Thus counsel states:

> " 'Under this instruction the jury is permitted to find the 'circumstances' from which the malice is to be inferred by any standard of proof acceptable to them or by no standard at all.'

"Counsel then argues that each fact establishing the chain of circumstances leading to the inference of actual malice must be established by clear and convincing evidence, and that the instruction was therefore defective in only requiring that the ultimate fact of actual malice be inferable with convincing clarity. No citation of authority accompanies defendants' arguments on this point. While we find no decisions directly in point dealing with a 'clear and convincing' standard of proof, we do find directly analogous decisions in the criminal law dealing with a 'beyond a reasonable doubt' standard. These decisions establish that it is the ultimate issue or particular element of the crime which must be established beyond a reasonable doubt

and not each circumstance or fact introduced into evidence. UNITED STATES v. HALL, 198 F.2d 726 (2d Cir. 1952); STATE v. PARIS, 43 Wash.2d 498, 361 P.2d 974 (1953); STATE v. PACK, 106 Kan. 188, 186 P. 742 (1920); 30 Am.Jur.2d, Evidence § 1172.

"In our opinion this same principle is equally applicable to cases involving a 'clear and convincing standard of proof.' We therefore reject defendants' attack on Instruction No. 7 in this regard." (App. to Appellants' Jurisdictional Statement at 18-20).

Again the question here raised does not warrant the review of this Court.

CONCLUSION

Appellants cannot establish jurisdiction in this Court to hear this Appeal. In any event, the federal questions raised are so insubstantial that if jurisdiction were assumed the order below should be affirmed without further argument.

Should the Court treat the Jurisdictional Statement as a Petition for Certiorari, the Petition, for the same insubstantiality of the federal questions claimed to be raised should be denied.

Respectfully submitted,
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March, 1976.

TABLE OF AUTHORITIES CITED

APPENDIX

Portion of Opinion and Judgment of Court of Appeals Dated July 15, 1975, as to which there is an inadvertent omission in Appendix to Appellants' Jurisdictional Statement.

"QUESTIONS VII, VIII and IX

PLAINTIFF'S REQUESTED INSTRUCTION CONCERNING THE LIABILITY OF ALL DEFENDANTS

Plaintiff's Requested Instruction No. 19 was given by the trial court and reads as follows:

> "You are further instructed that a corporation can only act through its agents, employees and officers. And in connection, I instruct you if you bring in a verdict in favor or [sic] the plaintiff, it must be against all defendants."

Defendants complain about that portion of the instruction which required the jury to find against *all* defendants if it found its verdict against any defendant. Defendants contend that under the Times v. Sullivan "actual malice" test, the jury could well have found that one or more of the defendants did not have the requisite knowledge of falsity, and therefore would not have been liable, notwithstanding possible liability on the part of the other defendants. We will dicsuss this contention as to each defendant separately.

As to the defendant corporation, it is contended that the doctrine of *respondeat superior* is "inapplicable as being overridden by the requirement of proof of actual malice." While this contention is somewhat broadly stated, we do not understand defendants' contention to be that under no circumstances can a corporate defendant employer be held liable for libel under the Times v. Sullivan test. Rather, the argument appears to be that defendant Pulliam had the ultimate

authority to approve or disapprove the publishing of the editorial, and that in fact it was he who authorized its publication and it was upon his responsibility that it was published. It is then argued that if defendant Pulliam was free of actual malice then the defendant corporation, Phoenix Newspapers, Inc., could not be said to have been actuated by actual malice notwithstanding any malice which the trial court might find on the part of defendant Padev. In support of this position defendants cite the following language from Times v. Sullivan:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.*" 376 U.S. at 287, 848 S.Ct. at 730 (Emphasis added).

We do not find the same meaning in this language from Times v. Sullivan as is apparently discerned by defendants. In the facts *in** *Times there was no employee having any responsibility in connection with the acceptance or publication of the allegedly libelous advertisement who knew the advertisement was false. Here both Padev and Pulliam were directly involved in the activities leading to the publication of the editorial, and as we have previously indicated in our opinion the evidence was sufficient to submit to the jury the issue of whether one or both of them had knowledge of its falsity. We find nothing in Times v. Sullivan or its progeny which would purport to change in any way*

*Beginning of omitted portion of Opinion.

well-settled principles of agency law making the employer liable for defamatory statements made by an employee acting within the scope of his employment. See Restatement of Agency Second, § *247.*

Under the facts of this case no sound argument can be made that defendant Padev's activities concerning the writing and publishing of the editorial were not within the scope of his employment with the defendant corporation. We therefore hold that actual malice on the part of either Pulliam or Padev would be imputed to the corporation as their employer. It follows that as to the defendant Phoenix Newspapers, no error was committed by the giving of Instruction No. 19 since the jury could not find against either Pulliam or Padev without being required to find against their employer, Phoenix Newspapers, Inc.

*We next consider the propriety of Instruction No. 19 insofar as concerns defendant Pulliam. He was the president of the defendant corporation which owned the newspaper, and, as previously stated, exercised overall control of its editorial policies. Defendant Padev, while subject to the overall control and authority of defendant Pulliam, was an employee of the defendant corporation. Although not cited by plaintiffs, we do find some authority which would support a holding that under these circumstances a defendant in Pulliam's position could be held equally liable with the owner, defendant Phoenix Newspapers, Inc., for the publication therein of a libelous editorial, even in the absence of evidence.*** of personal participation. See authorities cited, 50 Am.Jur.2d, Libel and Slander, § § 335, 336. We question the legal soundness of these decisions. *See* Folwell v. Miller, 145

**End of omitted portion of Opinion.

F. 495 (2d Cir. 1906); Knoxville Pub. Co. v. Taylor, 31 Tenn. App. 368, 215 S.W.2d 27 (1948). However, regardless of any prior validity which such a concept might have had, it is our opinion that it cannot survive the impact of "actual malice" principles enunciated in Times v. Sullivan. We therefore start with the premise that under Times v. Sullivan, apart from the application of the doctrine of *respondeat superior*, an individual defendant cannot be held liable unless the jury finds that the individual himself has been actuated by actual malice (knowledge of falsity). Applying this principle to the case at hand, before defendant Pulliam could be held liable, the jury was required to find that he, himself, was actuated by actual malice (knowing falsity) when he participated with Padev in the activities culminating in the publication of the editorial. Plaintiff has presented no theory nor has he cited any authority under which any malice found on Padev's part could be imputed to the defendant Pulliam. The evidence on knowledge of falsity was not such that it was inherently applicable equally to both individual defendants on this issue, thereby requiring a finding that either both had knowledge of falsity or that neither had knowledge of falsity. Under the evidence the jury could well have found that defendant Padev had, and defendant Pulliam did not have, such knowledge.

Without going into a detailed review, there was evidence that Padev had written the editorial on his own initiative prior to any conversation with Pulliam, and that Pulliam authorized the publication of the editorial with a much more limited knowledge of its actual contents than that possessed by Padev; that Padev was the foreign affairs editor of the newspaper and a recognized expert on communism; that because of Padev's expertise, Pulliam had complete

confidence in his analysis and views concerning the people's council idea espoused by plaintiff. Further, the evidence in this trial as to Pulliam's knowledge and belief as to whether plaintiff was a communist was much weaker than that of Padev. Based upon this evidence, the jury might well have found that Pulliam did not have actual malice—that is, knowledge that the people's council proposal espoused by plaintiff was not similar or comparable to the people's council idea advocated by communists.

We therefore hold that the giving of Instruction No. 19 constituted reversible error as to defendant Pulliam.

We turn now to the question of whether the giving of Instruction No. 19 constituted reversible error as to the defendant Padev. From what we have previously stated in this opinion, it is obvious that a stronger case of actual malice (knowing falsity) was presented against Padev than was presented against Pulliam. Padev was the initiator and the writer of the editorial. He was the expert on communism. It was based upon his representations concerning people's councils that Pulliam authorized the publication of the editorial. Although the giving of the instruction may have constituted technical error as to Padev, it is difficult to see any prejudice to Padev from an instruction which in essence prohibited a verdict against him, unless a verdict was also returned against Pulliam, against whom a weaker case had been presented.

Counsel argues that the principal prejudice against defendant Padev arises from the fact that Instruction No. 19 requires a finding of liability on his part if liability is found on the part of two "target" defendants, that is, defendant Pulliam and defendant Phoenix Newspapers, Inc. As we have

previously stated, any actual malice found on defendant Padev's part would be imputed to defendant Phoenix Newspapers, Inc., thereby automatically requiring a verdict against Phoenix Newspapers under such circumstances. Therefore, Instruction No. 19 was not erroneous insofar as it concerns the linking of defendants Padev and Phoenix Newspapers, Inc. for liability purposes.

As to defendant Pulliam's status as a "target" defendant, we finding nothing in the record to support this contention.

The judgment of the trial court is affirmed as to defendants Padev and Phoenix Newspapers, Inc., and reversed as to defendant Pulliam.

JACOBSON, P. J., and OGG, J., concurring."

PHOENIX NEWSPAPERS, INC., a corporation; Eugene C. Pulliam and Michael Padev, Appellants,

v.

Wade CHURCH, Appellee

No. 8122.

Supreme Court of Arizona.

In Banc.

Nov. 27, 1968.

Rehearing Denied Dec. 24, 1968.

Libel action arising out of publication of newspaper editorial. The Superior Court, Maricopa County, Warren L. McCarthy, J., found for plaintiff and defendant appealed. The Supreme Court, Lockwood, J., held that editorial which stated that attorney general's suggestion was political basis of communist regimes and went on to explain how communists employed such suggestions to seize power was libelous per se but that instruction in libel action that actual malice may be inferred from wrongful motive in publication of matter, or from absence of proper caution, or want of proper justification, or lack of good faith was fatally defective.

Reversed and remanded with directions.

Udall, V. C. J., dissented in part.

Bernstein, J., dissented.

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Gust, Rosenfeld & Divelbess, Snell & Wilmer, by Mark Wilmer, Phoenix, for appellants.

Liebsohn, Goldstein & Weeks, by Philip T. Goldstein, Phoenix, for appellee.

LOCKWOOD, Justice:

Appellee Wade Church was Attorney General of the State

of Arizona at the time of the commencement of this suit for libel on May 11, 1959. His claim was based upon an alleged libelous editorial which appeared on the front page of the *Arizona Republic*, one of two daily newspapers published by appellant, Phoenix Newspapers, Inc. Appellant Eugene C. Pulliam was, and is, president and publisher of the corporate defendant; appellant Michael Padev was the author of the editorial by which appellee claims he was libeled.

The events preceding the publication of the editorial were the following:

On May 7, 1959, Mr. Church delivered a speech in Flagstaff, Arizona to the delegates of an AFL-CIO convention. The speech was not given from a prepared text but rather from notes; it was tape recorded, later transcribed, and produced in court by the defendants. Some of the pertinent portions of that speech which appear in the record are as follows:

> "* * * I want to talk to you a little bit tonight about why labor is in politics in Arizona. I think there is a number of reasons. I think the first reason is because management is dominating the political scene in this state, and they have dominated it since 1912.
>
> * * * * * *
>
> "* * * I think the first problem with reference to politics is the legislative control. Do you know that this legislature is controlled lock, stock and barrel by a third house that is not even elected by the people? They have a representative in the Hotel Adams that coordinates the work of all the special interest groups and you can't get a bill through unless you get their okay, and I am talking about the mining groups, and the power groups, and the construction groups, and the finance groups, and the cattle groups. They are all coordinated, they have a regular *council*, and the astounding thing is that the legislation that is passed is passed and okayed by this group. * * *
>
> "We, the people, what do we have to say about it? * * * Nothing, absolutely nothing. * * * It just makes you wonder whether or not the fundamental structure of our democratic order here in this state is going under, and I believe it is unless we take steps to change that." (Emphasis ours.)

Mr. Church proceeded to cite certain problems which existed in the state, and noted with regard to a need for equalization of educational opportunities, that

> "* * * That bill [a property evaluation bill] was lobbied through the legislature by the representative of the railroad group, it was his job. This *council* selected him to whip that through the legislature, you know. I saw him, he told me. And it is his job now to see that there is a representative of this unseen government before every County Board of Supervisors to make sure there is not too much money given the schools * * *. But nevertheless there you have a piece of special legislation that demonstrates that our legislature is run by a third house with headquarters in the Hotel Adams. I think it is a disgrace and we are going to have to do something about it. * * *". (Emphasis ours.)

He cited other problems which he thought should be solved by representative legislation and then stated:

> "Now, the working people and the people's groups are going to have to do *the same thing*. We are going to have to build a *council*. We are going to have to have *full-time representatives* up there at that legislature. We are going to have to watch it carefully. The *P.T.A.* ought to have them. The *Council of Churches* ought to have them, the labor groups ought to have two or three and those teachers, they are the ones that got a lot of brains, doggone them, they should be out there, too. * * *.
>
> * * * * * *
>
> "But the thing that worries me is this, that if we don't

do it, Democracy as we conceive it and as our kids learn it in the schools, will no longer exist in this state. If we don't *match stride for stride* the careful painstaking job that these special interest groups do in presenting their viewpoints to the legislature, *ours and others*, if we don't match that with the *people's council*, we are dead as a dodo and Democracy dies with it. We will bury our Democratic Order. We can't afford any longer in this state to have these special interests running us. * * * If we don't do it, then our children are going to live in a very, very shabby world * * *. If the labor organizations don't spearhead this people's movement for a restoration of the basic democratic principles that our forefathers fought for, no one will do it, and I think once you take the labor movement out of our current system, we are dead. We are dead. And any hope for *anything other than a totalitarian state* is dead with it. * * *" (Emphasis ours.)

The day following, a news report of the speech appeared in the *Arizona Republic* and in part stated:

"CHURCH FLAYS LEGISLATURE'S THIRD HOUSE

"FLAGSTAFF (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.

"He urged organized labor to join churches, PTA's, minority groups, and others and hire fulltime personnel to match *lobbyists* with the mines, power groups, construction industry, finance interests, and cattle groups. * * *"

A similar news account was published in the *Phoenix Gazette*:

"LABOR URGED TO COMBAT 'THIRD HOUSE'

By Bruce Kipp, Gazette Staff Writer

"FLAGSTAFF, May 7—Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which,

he says, management dominates the lawmaking in Arizona.

* * * * * *

"Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'if labor won't spearhead this movement, nobody will do it.'

* * * * * *

"We're going to do exactly what these boys are doing—hire our own representatives to this people's council to counteract the lobbyists of the mines, railroads, and utilities which, in turn, control the state. * * *."

Subsequently, on May 11, 1959 an editorial, prominently placed on the front page, rather than on the editorial pages, appeared in the *Arizona Republic*. This editorial, the subject of plaintiff's suit for libel, states the following:

"An Editorial

"COMMUNISM AND MR. CHURCH

"NOTHING ILLUSTRATES better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona.

"According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions.

"MR. CHURCH'S 'people's council' idea comes straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist

movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of all Communist regimes all over the world. The story of communism in power is essentially a story of the 'people's council' idea of government put into practice.

"When the Russian Czarist government fell apart early in 1917, the Russian democratic parties, which enjoyed the overwhelming support of the Russian people, formed democratically elected government organizations, including a central (federal) government responsible to an assembly (parliament).

"Later on the Russians elected a constituent assembly.

"In all these elected bodies the Communists had but a tiny and insignificant minority.

"But the Communists were not interested in votes—they never are. They were, as they are, interested in power alone.

"THE COMMUNIST PARTY, under Lenin, created its own 'people's councils' which functioned independently of the government just the way Wade Church wants the Arizona 'people's council' to function.

"These *Russian 'people's councils'* were supposed to consist of 'soldiers and sailors' and 'workers and peasants,' but were, in fact, dominated and manipulated by the Communists.

"It was these councils that played the most decisive role in the overthrow of the Russian national all-party government headed by the social democratic leader, Kerensky.

"It was these 'people's councils' that completed the destruction of the Russian 'bourgeois' (capitalist) state and

imposed the Communist regime. The first Communist cabinet, headed by Lenin, was actually called a people's council of commissars. In Russian the word 'soviet' means 'council' and the Soviet government is quite properly called 'council government.'

"THE COMMUNISTS employed the same 'council' technique in East Europe, as well as in the Far East, including Red China. *People's councils*, at times called patriotic councils, national councils, anti-Facsist councils, democratic councils, peace councils, and so on, *were formed by the Communists everywhere with the sole purpose of 'guiding,' i. e. intimidating, blackmailing, and terrorizing* the elected parliaments and district assemblies, which were not, at the beginning, Communist controlled.

"The 'people's council' idea is only another name for the Communist technique of the seizure of power and for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

"According to Communist theoreticians, from Marx and Lenin to Krushchev and Mao, only the 'advance guard' (the Communist leaders) of the 'working class' (the majority of the people) know how to interpret the 'historical laws of development' of our society.

"This supposedly enables the Communist leaders to know best what's good for the rest of us.

"Communists believe that they have the right and the duty to 'guide' the masses of humanity along the 'correct road' leading to socialism. The Communist-controlled 'people's councils' do this 'guidance' work with regard to the state.

" *'THE PEOPLE'S COUNCIL' idea of Attorney General Church* is therefore nothing but a disguised Marxist idea of

minority rule over the majority.

"We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

"We also sincerely hope that the Arizona labor movement—at whose annual convention last week Mr. Church first voiced his 'people's council' proposals—will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

"BUT MR. CHURCH, himself, owes an urgent explanation to the public. He has to state, publicly and clearly, whether or not his 'people's council' proposals are part and parcel of a general Marxist philosophy of government and of life.

"Does Mr. Church advocate socialism for Arizona?

"Does he advocate communism?

"Does he want 'people's councils' to take over our state government in the way thay have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?" (Emphasis ours.)

Plaintiff Church immediately filed his complaint for libel against Phoenix Newspapers, Inc., the publisher, Eugene Pulliam, and the editorial writer, Michael Padev, in the Superior Court for Maricopa County. On May 12, defendants published plaintiff's reply to the editorial rejecting the newspaper's "opinions and inferences expressed" regarding his talk. Defendants Pulliam and Phoenix Newspapers, Inc., after unsuccessful motions to dismiss the complaint, filed their answer thereto on May 29, 1961. Plaintiff thereafter was granted leave to amend his complaint, and it is upon the

amended complaint, and the subsequent answers of all defendants, that issues were joined. The case came on for trial April 29, 1963, and after a lengthy trial the jury entered a verdict for plaintiff in the sum of $30,000 compensatory damages, and $20,000 punitive damages. From this verdict and judgment, and from orders denying defendants' motion to set aside the verdict and judgment, and motions for a new trial, defendants appeal. We shall hereafter refer to the parties as they were designated below, as plaintiff and defendants.

Although defendants make numerous assignments of error on this appeal, three principal issues emerge: (1) Whether the court before trial ruled correctly that the editorial was libelous per se; (2) Whether the editorial was qualifiedly privileged, and if so, whether the editorial constituted fair comment; (3) Whether sufficient evidence was adduced to prove both falsity and actual malice. In the light of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed.2d 686 (1964) we must also determine whether the verdict and judgment abridge unconstitutionally the freedoms guaranteed by the First Amendment to the United States Constitution.

1.

The first question to be decided is whether the trial court was correct in its ruling before the trial that the editorial was libelous per se. We agree that it was. Defendants vigorously contend that, at most, the editorial is susceptible to two meanings—one libelous, the other nonlibelous; that if anything, the editorial is libelous per quod and as such should have been submitted to the jury for a determination whether the editorial was actionably defamatory. Defendants assert

that the editorial was a comment upon a political speech, that such comment was based upon true facts, and that while the editorial does state that the proposed "people's council" is a communist device, nevertheless, the idea, and not the plaintiff, was the subject of the attack, *ergo*, there is no charge that plaintiff has communist sympathies.

The guideline to be followed in determining whether a publication is libelous in and of itself has been previously stated by this Court in Central Arizona Light & Power Co. v. Akers, 45 Ariz. 526, 46 P.2d 126 (1935). In that case it was held:

> In determining whether the [publication] is libelous *per se*, we look to the language alone. * * * Words that are libelous *per se* do not need an innuendo because they are libelous in and of themselves. 45 Ariz. at 536, 46 P.2d at 131 (1935).

And, in Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957), it was stated that "* * * the entire article must be considered as a whole. * * * This is true not only with reference to its exact language but in accordance with its sense and meaning under all the circumstances surrounding its publication."

A publication is libelous "if [it] tends to bring any person into disrepute, contempt or ridicule or—to impeach his honest, integrity, virtue or reputation, and is false and defamatory." Phoenix Newspapers v. Choisser, 82 Ariz. 271, 275, 312 P.2d 150, 153 (1957). And see Broking v. Phoenix Newspapers, 76 Ariz. 334, 337, 264 P.2d 413, 415, 39 A.L.R.2d 1382 (1953).

The trial court in the first instance examines the publication for its defamatory content, and "if the language charged to be libelous is unambiguous it is the function of the court

to say whether it is libelous per se". Broking v. Phoenix Newspapers, supra, 76 Ariz. at 337, 264 P.2d at 415.

Viewing the editorial as a whole, and keeping in mind that

> "What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest." Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 366 F.2d 649, 655 (1966),

and that

> "[T]he publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 547, 343 P.2d 36, 41 (1959),

we are convinced that the editorial is libelous on its face, i.e., *per se*, and that the trial court was correct in its ruling. [1] Taking the editorial statement for what it actually is, it could not have any other effect than to cause injury to the

1. Defendants devote considerable space in their brief to the proposition that the plaintiff, for his failure to allege "special damages" has drawn a complaint which is insufficient as a matter of law and good pleading. The controversy still rages among commentators and courts as to the relative significance of the legal principles distinguishing libel per se from libel per quod [Compare Eldredge, "The Spurious Rule of Libel Per Quod", 79 Harv.L.Rev. 733 (1965/66), with Prosser, "More Libel Per Quod", 79 Harv.L.Rev. 1629 (1965/66); and see Hinkle v. Alexander, 244 Or. 267, 411 P.2d 829, 417 P.2d 586 (1966): "We are not so much concerned about which of the opposing rules has the actual support of a majority of the courts. Our prime concern is which rule is the better, more workable and less confusing. We conclude that the Restatement rule (§ 569 (1938)) is to be preferred and adhere to it". 244 Or. at 277, 417 P.2d at 589]. In this case, however, the defamatory meaning is within the editorial itself. See Cen. Ariz. L. & P. Co. v. Akers, 45 Ariz. 526, 46 P.2d 126 (1935).

reputation of a person in Wade Church's position,[2] for it charges that "Mr. Church's 'people's council' idea" is the political basis of all communist regimes and the "cornerstone of the philosophy of Lenin, the founder of the Soviet state," as well as coming "straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement". It then proceeds to explain in scholarly, clear and unmistakable language how communists employed the people's council technique (already described as "Mr. Church's 'people's council idea' ") for the purpose of " 'guiding' i.e., intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies" in the process of seizure of power by communists. It plainly states "*The people's council idea of Attorney General Church* is therefore nothing but a disguised Marxist idea of minority rule over the majority". (Emphasis added.)

The apparently rhetorical questions at the end of the editorial ask plaintiff to state whether "*his* 'people's council' " proposal (already characterized as a communist device employing the technique of intimidation, blackmail and terrorism) is part and parcel of a *general* Marxist (i.e. communist) philosophy of government and life, and whether he advocates socialism or communism for Arizona, with a desire to have people's councils (characterized as "Mr. Church's" idea) take over the state government in the way they have taken over all unhappy lands behind the Communist Iron Curtain. The insinuation that "Mr. Church's idea," embodies and approves of communist methods of intimidation, blackmail and terror, is so apparent here as to leave no room for

2. Cepeda v. Cowlew Magazines & Broadcasting Co., 328 F.2d 869 (9th Cir. 1964) aff'd., 392 F.2d 417 (9th Cir. 1968); Fairbanks Publ. Co. v. Pitka, 376 P.2d 190 (Alaska 1962).

argument. "A person may be liable for what he insinuates as well as for what he says explicitly." Cameron v. Wernick, 251 A.C.A. 1025, 60 Cal.Rptr. 102, 104 (1967); MacLeod v. Tribune Publishing Co., supra, 52 Cal.2d at 547, 343 P.2d at 42 (1959). There is respectable, and persuasive authority for the proposition that to charge a person with communist sympathies, leanings, and sentiments, or that such person is a "fellow-traveler", constitutes libel *per se*:

> "Whatever the rule may have been when anti-communist sentiment was less crystalized than it is [Citations] it is now settled that a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face." MacLeod v. Tribune Publishing Co., 52 Cal.2d at 546, 343 P.2d at 41. And see, 33 A.L.R.2d 1186, 1212 (1954) and cases collected therein.

The whole thrust of the editorial is to link inseparably Wade Church and the idea of a "people's council" to the communist "people's council", thus charging him with espousing a communist doctrine involving intimidation, blackmail and terrorism. This is clearly no less than a charge of being in sympathy with communism in its lawless and violent aspects. The defamatory impression originally left in the minds of the readers of this editorial was thus reinforced by the series of questions at the conclusion of the editorial.

There is probably no quicker, more devastating means for bringing a man into public contempt and hate than to affix to him the label "communist", or to link him otherwise to sympathy with communist ideology in its violent aspects, and this was particularly so in 1959. It is absurd to assert that under such circumstances the editorial, as claimed by the defendants, merely attacked plaintiff's idea, and therefore was completely lacking in any accusation against plaintiff himself. It was basically a statement that plaintiff's attitude, expressed by

his idea, was sympathetic with violent communist methods.

As was said in Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 366 F.2d 649 (1966):

> "Appellant contends that as a matter of law the article is not libelous since Mr. Stone did not flatly state that plaintiff was prejudiced, and because it is not a statement of fact about plaintiff's conduct but a statement of opinion about his attitude. *Where readers would understand a defamatory meaning liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation or even question.* A statement about one's attitude is defamatory if it tends to lower him in the esteem of the community." 366 F.2d at 655 (1966) (Emphasis added.)

Defendants state that in 1959, it was not *unlawful* in Arizona to be a communist or a member of the Communist Party.[3] Though this is true from a purely legal point of view, our discussion hereafter of the issue of malice forecloses the relevance of this argument.

What we have so far stated does not, of course, foreclose the possibility that the judgment cannot stand in light of recent United States Supreme Court decisions dealing with the freedoms guaranteed by the First Amendment. Our inquiry will be directed, therefore, to an examination of the facts and proceedings of the case at bar "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited,

3. However, in 1961, the state legislature proscribed the Communist Party with regard to any rights or recognition as a political party in Arizona, by reason of its "dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the state of Arizona and its political subdivisions ultimately must be brought to ruin by any available means, including resort to force and violence." A.R.S. § 16-205. Arizona Communist Control Act. (1961).

robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials". New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed. 2d 686 (1964).

The First Amendment to the Constitution of the United States provides in part that "Congress shall make no law * * * abridging the freedom of speech, or * * the press; * * *". The decision in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) made the freedoms guaranteed by the First Amendment applicable to the states via the Due Process Clause of the Fourteenth Amendment. And since *Gitlow*, the permissible scope of state action in regulating these freedoms through legislation or otherwise has been greatly circumscribed by many decisions of the United States Supreme Court. Of controlling importance for the proper disposition of this appeal is the rule announced by the Court in the case of New York Times Co. v. Sullivan, supra. The Court held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with *'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*" 376 U.S. at 279-280, 84 S.Ct. at 726 (1964) (Emphasis added).

Following the announcement of the *Times* decision, commentators expressed divergent views as to which of the constitutional tests[4] the Court relied upon in reaching the Times

4. "Clear and present danger", (Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919)); "redeeming social value", (Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); or "balancing" (see Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, L.Ed.2d 105 (1961)).

result.[5] This matter in part was put to rest by the remarks of Justice William Brennan, Jr. in a paper delivered as the Alexander Meikeljohn Lecture at Brown University on April 14, 1965. The lecture, entitled "The Supreme Court and the Meikeljohn Interpretation of the First Amendment", 79 Harv.L.Rev. 1 (1965), in part stated:

> "[T]he Court examined history to discern the central meaning of the first amendment, and concluded that the meaning was revealed in Madison's statement 'that the censorial power is in the people over the Government and not in the Government over the people' ". 79 Harv.L.Rev. 1, 15 (1965).

For Alexander Meikeljohn, the First Amendment and its "central meaning" absolutely forbade any encroachment upon its freedoms from any quarter. Meikeljohn, The First Amendment Is An Absolute, 1961 Supreme Court Review 245. And, Justice Black, in a concurring opinion in the *Times* decision in which Justice Douglas joined, expressed a similar view:

> "I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power." 376 U.S. 254, 293, 84 S.Ct. 170, 733 (1964). And see Black, The Bill of Rights and the Federal Government in THE GREAT RIGHTS (Cahn ed. 1963).

The majority of the Court as yet do not subscribe to the absolutist philosophy, for as was stated by Justice Brennan further on in the Meikeljohn Lecture:

> "Note that the *New York Times* principle has an

5. See, e.g. Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment", 1964 Supreme Court Review 191 (Kurland ed.).

> important qualification: it does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or not. *The underpinning of that qualification is the 'redeeming social value' test.*" 79 Harv.L.Rev. 1, 18-19 (1965) (Emphasis added.)

The 'redeeming social value' test (in the context of Times) implies that though a communication or publication may have been privileged when made or published, its privileged status is defeasible upon a showing that the publisher was motivated by actual malice—knowledge of falsity, or reckless disregard for whether that which spoken or published was false. Therefore, in order for a publication or utterance to retain its privileged status, it must, in the marketplace of ideas and opinions, be of redeeming social value.

This view is buttressed by the later opinion of the Court in the case of Garrison v. Louisiana, 379 U.S. 64, at page 75, 85 S. Ct. 209, at page 216, 13 L.Ed.2d 125 (1964) where it is stated:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. [Citations] That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of

utterances which *'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* * * *' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 [62 S.Ct. 766, 86 L.Ed. 1031]. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" (Emphasis added.)

As a further elaboration upon the constitutional rule announced in Times, vis-a-vis "malice", the Court in Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) noted:

> "Its [New York Times] definition of 'actual malice' is not so restrictive that recovery is limited to situations where there is 'knowing falsehood' on the part of the publisher of false and defamatory matter. *'Reckless disregard' for the truth or falsity, measured by the conduct of the publisher*, will also expose him to liability for publishing false material which is injurious to reputation." 388 U.S. at 164, 87 S.Ct. at 1996. (Emphasis added.)

And, in summary, the Court has held in Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966):

> "[T]he most repulsive speech enjoys immunity provided it falls short of a *deliberate or reckless untruth.* But it must be emphasized that malicious libel enjoys no constitutional protection in any context." 383 U.S. 53, 63, 86 S.Ct. 657, 663 (1966). (Emphasis added.)

It is incumbent upon this Court to examine our cases dealing with libel of public officials to determine whether the standards announced therein square with the constitutional principles which bind this Court in the disposition of this appeal.

2.

The trial court, in addition to its ruling on the question of libel per se, found that the publication was a qualifiedly privileged communication, the occasion for its privileged status being plaintiff's public speech given at a time when plaintiff was Attorney General of this State. The rule of *Times* is a constitutional rule of privilege, and we are bound to meet its requirements. Our prior decisions regarding what circumstances constitute an occasion for such privilege require that publications about matters of public interest and concern are to be accorded wide latitude, and that only proof of *actual malice* and falsity will defeat the privilege and allow an award for damages. See Phoenix Newspapers v. Choisser, supra, 82 Ariz. at 277, 312 P.2d at 154; Broking v. Phoenix Newspapers, 76 Ariz. at 340, 264 P.2d at 416.

The question arises whether the Arizona standard of "actual malice" meets foursquare the *Times* standard. We previously have held that "Malice cannot be inferred from an article published on a privileged occasion alone. * * * The malice which plaintiffs must establish is not legal malice or malice at law, but it must be actual malice, malice in fact, express malice". Phoenix Newspapers v. Choisser, 82 Ariz. at 278, 312 P.2d at 155.[6] The constitutional requirement forbids any presumption of malice, or inference of malice and makes it the burden of plaintiff to prove actual malice. New York Times v. Sullivan, 376 U.S. 254, 284, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We believe that our cases dealing with the question of malice and its substance clearly meet the rigid requirements of the *Times* rule, and particularly

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6. This rule of malice was cited approvingly in New York Times v. Sullivan, 376 U.S. at 280, footnote 20, 84 S.Ct. 710.

the later decision in Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) which held:

> "[O]nly those false statements made with the high degree of awareness of probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74, 85 S.Ct. at 216 (1964).

3.

The crucial, and dispositive determination to be made on this appeal is whether plaintiff at trial introduced evidence sufficient to submit to the jury the question of malice and falsity as defined by *Times* and the cases following thereafter. Moreover, that evidence must be of "convincing clarity" to satisfy the constitutional standard. *Times*, supra, 376 U.S. at 285-286, 84 S.Ct. 710. To prove actual malice[7] is indeed a heavy burden to be borne by the plaintiff here, and that is as it should be. Otherwise, the use of a libel suit as a means for stifling free debate and discussion of important matters of our times would be greatly increased, with the result that

> "The threat of being put to the defense of a lawsuit brought by a * * * public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, * *" Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 968 (1966).

We are therefore in accord with the principle of privileged

7. It is of interest to note the view expressed by Justice Black regarding the "malice" requirement of *Times*:

> " 'Malice' * * * is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguards embodied in the First Amendment." (Black, concurring in *Times*, 376 U.S. at 293, 84 S.Ct. at 733.).

communication regarding a public official, even where the defamatory publication is false, but must also apply the proviso that it was not made "with knowledge of its falsity or in reckless disregard of whether it was false or not". New York Times v. Sullivan, supra. Since the jury by its verdict must have found that the editorial was made either with knowledge that it was false, or with reckless disregard of whether it was false, we examine the record to determine whether there was sufficient evidence to sustain such finding.

The evidence presented at the trial clearly disclosed that plaintiff was neither a communist nor sympathetic with communist theology or ideology. The overwhelming weight of the evidence adduced from both defendants' and plaintiff's witnesses demonstrated that to label plaintiff as a communist or impute to him ideologies which inclined to communism would be to utter a gross untruth.

The evidence introduced with regard to the inspiration for, the preparation, and the approval of the editorial is illuminating on the question of malice. Plaintiff proceeded on the theory that the editorial demonstrated unequivocally a reckless disregard for fair and factual commentary respecting the speech delivered to the convention in Flagstaff on May 7. Defendant Padev, author of the editorial, testified that he did not hear the speech, and that he was not present in Flagstaff on May 7. He testified:

> "Q. Let me ask you this question, and I want it clearly understood between you and me what the import of it is, as pertaining to your obtaining information, the information that you obtained before you wrote this editorial, and for the purpose of writing this editorial was based upon the report, printed report, of your reporter in your newspaper and what you heard

over the radio, am I right?

"A. You are right.

"Q. From no other source?

"A. Two newspapers, not one.

"Q. From no other source?

"A. Yes, sir."

He testified that the phrase "people's council" was the basis for his editorial comment; that the idea of a people's council was a "very dangerous idea indeed". Quite obviously, the meaning Padev attributed to the phrase "people's council" was not the meaning intended by Church, and a cursory examination would have revealed the discrepancy.

Mr. Padev testified that he had not heard the speech. His further testimony appears as follows:

"Q. Prior to the time you wrote this editorial, did you suspect this man of being possessed with communistic inclinations?

"A. No, sir.

"Q. Have you since?

"A. No.

"Q. You don't today?

"A. No, I don't. I certainly don't, no.

"Q. You made no investigation to obtain the factual matters as printed in that editorial, except from what you heard?

"A. What investigation? I knew what I knew, which was, I think, enough about the council, the *communist council device*. And it was a fact that Mr. Church had made a speech and recommended a device which could have been, or could be, usually it is, used by the communists, and I attacked the idea." (Emphasis added).

Throughout his testimony defendant Padev insisted that it was not plaintiff Church he was attacking but "Mr. Church's

idea of the people's council". He further testified that "there is nothing communistic about Mr. Church's ideas either" and that there was nothing communistic about Mr. Church's speech.

It is a matter of general knowledge, particularly among persons familiar with communist vocabulary, that many words and phrases in common usage by non-communists when used by communists, have a completely different connotation and meaning. See J. Edgar Hoover, Masters of Deceit (reference to communist use of "Aesopian language") 1957. Also, Harry and Bonaro Overstreet, the War Called Peace (chapter 9, "Speaking in Tongues") 1961. Defendant Padev testified to considerable first hand knowledge of communist procedures and therefore was without doubt aware of these semantic differences. The newspaper reports, as well as plaintiff's actual speech clearly demonstrated the ordinary meaning of the phrase "people's council," particularly in view of Padev's testimony above.

An editor of the Republic, Frederick Marquardt, testified that it was his duty to approve all editorials before publication. He stated, however, that in this particular instance he did not approve the editorial before publication, did not read it before publication, but did know the general contents of the editorial and knew what the title was to be. To the question why he had not approved it, he replied that defendant Pulliam, the publisher, had approved the editorial. The evidence developed that defendant Pulliam was out of Phoenix on the day of approval; that Pulliam had telephoned the offices of the *Republic*, for general purposes, and had talked with Padev about the proposed editorial. Pulliam did not have a copy of the proposed editorial nor is the evidence entirely clear that he knew precisely how it was phrased.

Defendant Pulliam testified that he had read the newspaper report of the Church speech in his own paper. He further stated that defendant Padev had telephoned him and called his attention to the phrase "people's council" which disturbed him (Pulliam) and that "there is probably nobody in America who understands communism like he (Padev) does".

Defendants Pulliam and Padev and the witness Marquardt all testified that they had no belief that plaintiff Church was a communist, and the witness Marquardt stated that he had no knowledge or belief that Church had any sympathy for the communistic philosophy.

Michael Padev was qualified as an expert on communism at trial. Much of his testimony was directed to how the "people's council" device was a convenient means for communists to take over non-communists governments. In the face of the evidence regarding plaintiff's actual speech, and the newspaper reports thereof which referred to "a people's council" in the clearly expressed meaning of a lobby group to offset the "excessive influence" being exerted on the legislature by other such groups, or "councils," Padev steadfastly asserted that the council proposed by Church could surely be the first step to communism in Arizona government. Padev was asked:

> "Q. You know that communism thrives on animosity and destruction of the enemy, and you knew, didn't you, that the editorial would destroy this man, didn't you?"

He replied:

> "A. I wasn't thinking of Mr. Church, I was thinking of Mr. Church's proposal, people's council.
>
> "Q. If you weren't thinking of Mr. Church, why did you say very first up there 'Communism and Mr. Church'?
>
> "A. That was taking the two facts together, communism, and the Church speech at Flagstaff on the other hand, and the editorial tried to discover what was the relationship between the two."

The defense proceeded on the theory that every statement of the editorial was true or substantially true. Padev again testified at length upon communist theory, the revolution in Russia, the great and abiding fear he had in a communist takeover in America, and the strong possibility that the people's council proposed by plaintiff would be the vehicle for communist domination of Arizona.

Padev revealed his true belief and state of mind in the following testimony:

> "A. Well, the latest one which really made me write the editorial was the proposal, the people's council proposal, he set forth in his Flagstaff speech.
>
> "Q. Why did you consider that left-wing?
>
> "A. It is very left-wing, because, first he says this is a shabby world unless we correct it. This is awful, you know. *This is one of the most effective methods of left-wingers and of communis.. of attacking the free enterprise system.* You create the impression that everything is awful. He said shabby world, 'our children will live in a shabby world,' and things like that. It is very bad.
>
> "Second, he says the legislature is controlled by the Adams Hotel. *Now, in Russia they used to say that the legislature was controlled by the—they used to call it the Astoria Hotel. That is where the bankers were going. In Marx, you will see he says the same thing, that it is controlled by the stock exchange. These are standard expressions, routine expressions, by people belonging to the left-wing who want to undermine the confidence which people have in their own legislature.* Now, if you say the legislature is run by the Adams Hotel—

how many people can you put in the Adams Hotel—you don't believe in voting any more. It means that the legislature elected by the people is controlled by about ten people in the Adams Hotel. This is a very, very dangerous idea.

"Q. This is why you considered it dangerous?

"A. Yes, sir. Yes, sir, left-wing and dangerous." (Emphasis supplied.)[8]

8. Plaintiff introduced into evidence the column of Claiborne Nuckolls published in the *Arizona Republic* on March 29, 1959. This piece of political commentary, set out below, expresses a position not unlike that advanced by plaintiff in his speech on May 7, 1959.

"THE STATE WE'RE IN

By Claiborne Nuckolls

"IF ANYONE doubts there exists a 'third house' of the Arizona Legislature that amounts almost to an invisible government, such doubts would have been dissipated had they been able to watch the recent legislative session from the sidelines as this reporter did.

"It is a house composed of lobbyists and other representatives of special interests, for the most part selfish in their goals. Its influence on what the lawmakers did or did not do was perhaps stronger, more dominating than this observer has ever seen before, particularly in the state senate.

"What and who are the interests that comprises the 'third house'? First come the copper mines. And don't believe for a moment that the political power of the mining interests has waned.

"Unrelenting opposition of this group almost succeeded in blocking any kind of school finance legislation and did in fact, result in passage of a measure that falls far short of the type of bill that Governor Fannin wanted. That any kind of bill at all was passed I attribute to two things primarily: (1) the governor's refusal to be cowed by the mining spokesmen, and (2) the backing given him in the less copper-collared house of representatives.

"RANKING NEXT in importance as members of the 'third house' come the railroads, the utilities and the pipeline corporations. However, it is to the credit of the railroads and utilities that, so this column is informed by responsible sources, they

Clearly, this testimony could have been considered by the jury to be persuasive in determining whether the editorial was actuated by actual malice.

To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.

finally saw the need for and went along with school aid legislation. –

"Railroad lobbyists, however, did push through a law requiring the public to bear half the costs of installing safety signal devices at grade crossings, and the utilities nearly got through a bill requiring the state to pay costs of relocating utility facilities on highway rights of way when space occupied by these installations is needed for highway purposes.

"Some representatives of the insurance industry almost prevented passage of a bill permitting state highway patrolmen to retire at a younger age than now is allowed.

"This column is informed that the liquor industry was quite active in lobbying against certain phases of proposed stronger traffic control legislation, particularly as regards stiffer penalties and more certain and sure punishment for drunk driving.

• • •

"However, the influence of lobbyists was apparent in connection with virtually every major piece of legislation passed by the last legislative session.

"I am reminded of what Johnny Johnson, former representative from Parker, once said as he ran the gantlet of lobbyists after emerging from the house chamber:

" 'There's nothing wrong with the legislature except there's too many lobsters around here. Every time I come out of that door a dozen lobsters grab me and try to lobster me.' "

Defendants complain of the trial court's refusal to given an instruction on the defense of fair comment. We agree this should have been done. "Fair comment" is a form of qualified privilege applied to publications of the news media. It is limited to discussions of matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community. See Prosser, Law of Torts, 3rd ed., § 110 (1964), and cases cited. Under the ruling in *Times*, it extends not only to expressions of opinion, but likewise to false statements of fact, unless made with "actual malice" as defined in *Times*. If the jury finds such actual malice, the defense of fair comment is defeated:

> "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. *Both defenses are of course defeasible if the public official proves actual malice, as was not done here.*" *Times* 376 U.S. at 292, 84 S.Ct. at 732.

The questions at the conclusion of the article proved to have the most significant impact upon plaintiff and doubtless had the same effect upon the reading public. During testimony of defendant Pulliam, the following occurred:

> "Q. And you knew what the consequences of publication of that article would mean, didn't you? Didn't you know what consequences of that publication would mean?
>
> "A. I don't know whether I knew what the consequences of any publication will be. I couldn't possibly expect to know what the consequences are.
>
> "Q. You knew that you would get letters such as Mrs. Stanlis's letter, did you not Mr. Pulliam?
>
> "A. I didn't know whether we would get a single letter or not. How could I know?

> "Q. Well, do you know what impact this made upon your reading public?
>
> "A. No, I don't.
>
> "Q. Well, let me read you what impact it made, printed by your own paper.
>
> " 'Good Work' Exhibit No. 6
>
> "EDITOR, THE ARIZONA REPUBLIC:
>
> "I want to congratulate you on the fine job you are doing in exposing communists in government.
>
> "I had heard Mr. Church on TV in the last campaign and must admit I was completely fooled. In fact, I actually went out and worked for the man.
>
> "Prior to reading your editorial I had never heard of these 'people's councils'. I suggest you take the initiative in starting a recall at once.
>
> "Keep up the good work."
>
> • • •
>
> Q. And do you think any other people thought like she did?
>
> "A. I don't know.
>
> "You don't. Well, let me show you Exhibit No. 7 and ask you if that is not an expression of what impact this editorial made upon your reading public?
>
> "A. Well, this is certainly a very fine defense of Mr. Church, and we printed it.
>
> • • •
>
> "Q. Let me show you Exhibit 8 for identification and ask you if that is another reader impact that you printed in your newspaper?
>
> "A. Well, this letter says a lot of worse things about us than we ever said about Church."

Exhibits 7 and 8 are set out below.[9]

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9. ***Plaintiffs' Exhibit No. 7:***

"Ruined Breakfast

"Editor, The Arizona Republic:

I am a Republic subscriber, I also read The Republic.

This and other similar testimony appearing on the record, was relevant for the purpose of showing damages, and the jury could have concluded that plaintiff was entitled to punitive damages as a result of the publication.

The final point which must be discussed is the matter of the court's instructions to the jury on the substantive law applicable to the case.

After instructing the jury that the court had found the

"I like The Republic. I realize that it is an opinionated paper.

"I do not know Wade Church. The majority of the voters in this state do know something about him, however.

"The editorial attack on Wade Church on May 11 must have ruined thousands of breakfasts. I mean good Republican breakfasts. I, for one do not care to have my intelligence insulted before nine in the morning. God save the intelligence of poor Mr. Church.

"This front page fiasco smacks of your most junior editorial writer, reflecting a sorry animosity of his employer, turning out a scorcher, paying no attention to truth, logic, relevance, or good taste.

"Gentlemen, the day is past when the best way to smear a man is to scream, 'Communist!'

"The editorial was far out of character for The Republic, I remain a subscriber and a reader. Not a Communist."

Plaintiffs' Exhibit No. 8:

"Church Defended

"Editor, The Arizona Republic:

"So you are up to your old trick of destroying those who get in your way or expose your racket. Racket it is, and just as bad as any labor rackets that have been getting publicity.

"Big Business racketeering is not publicized, but is equally guilty. Wade Church is a fine man with a fine family. He would fight racketeering wherever he found it. Because he is courageous enough to expose the truth of the way our legislature works, he has laid himself wide open to your wrath.

"You do not like opposition. Your philosophy is 'rule or ruin.' Perhaps you have gone a bit too far this time. Let us hope so, for the good of the people of Arizona."

editorial to be libelous per se and qualifiedly privileged, the jury was instructed that in order for plaintiff to prevail, it must find the editorial was false and was actuated by actual malice. On the matter of falsity, the court properly instructed that:

> "* * * [I]t is not necessary that the editorial be literally true in every detail. If the editorial is substantially true so as to justify its gist and the reasonable inferences therefrom, or if the plaintiff does not establish by a preponderance of the evidence that the article and reasonable inferences therefrom is not substantially true, then your verdict must be for the defendants."

The instruction regarding malice, to which defendants object, is as follows:

> "Actual malice may be inferred from the wrongful motive in the publication of the matter, if such be shown, or may be inferred from the absence of proper caution or want of proper justification for the publication of the matter, if such be shown, lack of good faith, if such be shown, or wanton or reckless disregard of the truth in publicizing the matter in the publication, if such be shown."

It seems obvious, from an examination of the proposed instructions on malice submitted by both plaintiff and defendant, that the trial court considered carefully the established legal basis for each instruction. However, New York Times v. Sullivan, supra, was not decided until nearly a year after trial of this matter. Consequently, failure to apply the principles enunciated therein at the trial of this case is not an adverse reflection on the trial court. Nevertheless, it is clear that the United States Supreme Court has made application of the *New York Times* case retroactive at least insofar as any cases pending in an appellate court from and after its issuance in March of 1964.

The definition of "actual" malice has been set forth, supra. And, in Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) the United States Supreme Court said:

> "It is clear that the jury instructions were improper. * * * The trial court * * * defined malice to include 'ill will, evil motive, intention to injure. * * *' This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; * * *. * * * [W]e held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was *false and it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.*" 383 U.S. at 83-84, 86 S.Ct. at 675.

Both plaintiff and defendants requested an instruction which included the elements of "spite or ill will", which were specifically rejected in *Rosenblatt*. Even if defendants might have been entitled, after the trial, but subsequent to the *Times* decision, to attack the trial court's instruction including "spite or ill will" as evidence of actual malice, defendants in their reply brief in this appeal specifically cite *Times*, supra, yet not only do they fail to attack the instruction on this basis, but merely attempt to refute testimony "evidencing ill will".

Nevertheless, we are of the opinion that, measured by the rules in New York Times v. Sullivan, supra, Rosenblatt v. Baer, supra, and Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the trial court's instruction on "actual malice" was fatally defective in its direction that in the alternative it may be inferred by "wrongful motive in the publication of the matter * * * or may be inferred from the absence of proper caution, or want of proper justification * * * lack of good faith * * *." *New York Times* rules out "negligence in failing to discover misstatements" as constitutionally insufficient for a finding of actual

malice. In St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Court held that lack of reasonable care in determining whether an asserted libel was false did not conform to the *New York Times* constitutional test of actual malice, nor could such lack be considered "reckless disregard" of whether the utterance was false or true. The instruction here that malice may be inferred from "absence of proper caution" is so close, if not synonymous with the phrase "lack of reasonable care", that it cannot meet the constitutional test flatly enunciated in *New York Times* above.

We therefore hold that: the court did not err in ruling the editorial was libelous per se, and in so instructing the jury, but that the instruction defining actual malice did not meet the required federal rule, and therefore requires that the case be reversed for a new trial.

Reversed and remanded with directions for further proceedings in accordance herewith.

McFARLAND, C. J., concurring.

STRUCKMEYER, Justice (specially concurring).

Since there are divergent opinions by the members of this Court as to the proper disposition of this case, I feel that it is desirable to briefly express the basis for my concurrence with Justice Lockwood.

The hard core of the editorial lies in these few sentences:

> "Nothing illustrates better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona. * * * THE COMMUNIST PARTY under Lenin created its own 'people's councils' which functioned * * * just the way Wade Church wants the Arizona 'people's council' to function * * * People's councils * * * were formed

> with the sole purpose * * * of intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies * * * The 'people's council' idea is only another name for the Communist technique of the seizure of power * * *."

These statements charge, not as an expression of opinion but as a positive assertion of fact, that Church proposed creating a people's council in Arizona to function just the way the councils that the Communist Party set up under Lenin functioned, they being formed for the purpose of intimidating, blackmailing and terrorizing legislatures and that this is the means of the Communists' seizure of power. It can only be understood to mean that Church was advocating the seizure of power through unlawful acts in the same manner as did the Communists, thereby destroying the democratic government of Arizona. The rhetorical question, "Does he [Church] advocate Communism," having already been answered by the previous purportedly factual statements, does not ameliorate the serious nature of the charges but serves rather to drive home to the reader the conclusion that Church was indeed advocating Communism.

That parts of the editorial may be fairly susceptible of another or other interpretations, that is to say, are not libelous per se, does not detract from or exclude the clear charge that Church wished to operate in the same way as the Communists, by intimidation, blackmail and terror.

> " 'It is further the law in this state and elsewhere that if the language charged to be libelous is unambiguous it is the function of the court to say whether it is libelous per se.' Broking v. Phoenix Newspapers, supra [76 Ariz. 334, 264 P.2d 415]." Phoenix Newspapers v. Choisser, 82 Ariz. 271, at 276, 312 P.2d 150, at 153.

Accordingly, it is my opinion that the trial court properly

instructed the jury that the editorial was libelous per se.

The jury, under the instructions of the trial court, found actual malice, malice in fact. I do not think it can reasonably be argued that there is insufficient evidence to sustain the verdict in this respect. The author of the editorial, Michael Padev, gained his information about Church's speech from a newspaper report, which is deserving of being requoted in part since, I believe, it is determinative of the question.

"CHURCH FLAYS LEGISLATURES' 'THIRD HOUSE'

> "FLAGSTAFF (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
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> "He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power group, construction industry, finance interests, and cattle-groups."

The newspaper account points out that what Wade Church meant by his use of the phrase "people's council" was to "hire full-time personnel to match lobbyists" with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. No stretch of the imagination can equate this democratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false. From knowledgeable falsity or a reckless disregard of whether it was false, there can be inferred malice. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262; Beckley Newspapers

Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248; Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, reh. denied 389 U.S. 889, 88 S.Ct. 11, 13, 19 L.Ed.2d 197, 198; Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456; Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597; Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892; Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125. See for example the statement in Curtis Publishing Co. v. Butts, supra, 388 U.S. 130 at 153, 87 S.Ct. at 1991:

> "That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."

The court instructed the jury, at the appellants' request, on the issue of malice as follows:

> "Now, as previously stated, in order for plaintiff to be entitled to recover in this case, he must prove by a preponderance of the evidence not only that the editorial and any reasonable inferences therefrom complained of was false, but also that the defendants were actuated or motivated by actual malice in publishing it.
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> "In this connection, you are instructed that to establish actual malice, you must find that the publication was wrongfully and intentionally published with spite or ill will towards the plaintiff, and with a desire to injure him. Mere negligence or carelessness alone is not sufficient."

The instruction does not conform to the subsequent ruling of the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, adhered to and quoted with approval in the numerous cases since. See cases cited supra. The present interpretation of

the First Amendment requires that a publication of and concerning a public official be false, and made either with the knowledge that it was false or with reckless disregard as to whether it was false.

The appellants' requested instruction was a correct exposition of the law as it then existed in Arizona. Phoenix Newspapers v. Choisser, supra; Broking v. Phoenix Newspapers, supra. Our invariable rule forbids that a litigant complain of his own requested instructions. We will not permit a party to lead the trial court into error. However, it is apparent that appellants, in good faith, attempted to apprise the trial court of the law in Arizona. This was their responsibility. They should not be charged with clairvoyance in not anticipating the course of the decision in New York Times v. Sullivan supra. The decision in that case was announced March 9, 1964. Appellants' opening brief was filed in this Court on April 20, 1964, and, while no reference was there made to the Times decision, the reply brief discussed it in detail. Further, counsel subsequently devoted the principal portion of his oral argument to the question of malice as it related to the Times decision. Accordingly, I am of the view that appellants timely raised the constitutional issue and this Court must give it the recognition that the Supreme Court of the United States did in Curtis Publishing Co. v. Butts, supra, and Rosenblatt v. Baer, supra.

The quoted instruction has been specifically condemned in Rosenblatt v. Baer wherein the United States Supreme Court stated:

> "* * * it is clear that the jury instructions were improper. * * * The trial court * * * defined malice to include 'ill will, evil motive, intention to injure. * * *' This definition of malice is constitutionally insufficient where

discussion of public affairs is concerned; * * *." 383 U.S. 75 at pp. 83, 84, 86 S.Ct. 669, at p. 675.

But were this Court to consider that the appellants could not question their own requested instruction, we would still be compelled to find reversible error in the light of the appellee's requested instruction also given by the court as discussed by Justice Lockwood.

Appellants raise two further matters which should be briefly considered in order that this case be correctly disposed of on retrial. First, appellants pleaded the defense of fair comment. They urge that this is a complete defense to the action and complain that the trial court refused to give their instruction embodying fair comment. In New York Times v. Sullivan, supra, it was recognized that the defense of fair comment is defeasible if actual malice is established. (See footnote 33.)

But the failure to give an instruction on fair comment is, in my opinion, clearly reversible error. There are certain statements in the editorial which are obviously comment. The jury should be instructed alternatively that the appellants are entitled to comment fairly upon any factual statements made without actual malice but as to any comments which are derived from or follow from knowingly false statements, or statements made in reckless disregard of whether they are true or false, the defense of fair comment does not apply.

Second, appellants complain of the introduction of certain exhibits as evidence of malice. It is not necessary to comment on each exhibit but sufficient to point out that evidence of aggravating circumstances is always admissible to enhance punitive damages where tortious conduct is

alleged. Lutfy v. R. D. Roper & Sons Motor Co, 57 Ariz. 495, 115 P.2d 161. On retrial, such of the appellee's evidence as shows aggravating circumstances should be admitted for consideration by the jury limited by a cautionary instruction that such evidence is admitted only for the purpose of establishing or enhancing punitive damages.

Because of the lack of adequate instructions on malice and fair comment. I am of the opinion the case must be reversed for retrial.

[Opinion of Udall, Vice Chief Justice (Concurring in part and dissenting in part) and opinion of Bernstein, Justice (dissenting) omitted.]